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IN THE
COURT OF APPEALS OF INDIANA

RODNEY D. KLING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0606-CR-248
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0205-FA-68

May 10, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Rodney Kling ("Kling") pleaded guilty in Elkhart Superior Court to two counts of Class B felony child molesting and was sentenced to consecutive twenty-year terms. He appeals his sentence, arguing that the trial court abused its discretion in its evaluation of aggravating and mitigating circumstances and that his maximum forty-year sentence is inappropriate. We affirm.

Facts and Procedural History

On May 21, 2002, the State charged Kling with three counts of Class A felony child molesting and one count of Class C felony child molesting, all involving Kling's molestations of four of his grandchildren. Kling entered into a plea agreement whereby he agreed to plead guilty to two amended counts of Class B felony child molesting and the State agreed to dismiss the remaining charges. The trial court accepted the plea agreement, and following a sentencing hearing on March 11, 2004, sentenced Kling to consecutive twenty-year terms on each conviction. After filing his belated notice of appeal on June 5, 2006, Kling brings this appeal. [1]

I. Aggravating and Mitigating Circumstances

Generally, sentencing determinations, including the finding of aggravating and mitigating factors, are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). When a trial court relies on mitigating or aggravating circumstances in deciding whether to deviate from the statutory presumptive sentence, it is required to: "(1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance has been determined to be mitigating or

[1] Kling filed a petition for post-conviction relief in 2005. On April 25, 2005, the trial court granted his motion to dismiss his Post-Conviction Rule 1 petition without prejudice.

aggravating; and (3) articulate the court's evaluation and balancing of circumstances." Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004).

A. *Aggravating Circumstances*

The trial court found the following aggravating circumstances:

> 1. The Defendant's criminal conduct occurred over a period of at least 9 years; thus, the Defendant had ample opportunity to recognize the criminality of his actions, and to seek professional help in ceasing that criminal conduct. The Defendant failed to do so.
> 2. The victims of this offense were the Defendant's grandchildren, and had a right to look to the Defendant for love, support, and protection. The Defendant occupied a position of trust with respect to those grandchildren in that their parents entrusted them to the Defendant's care, and he took advantage of that position by molesting them.
> 3. The Defendant is unwilling to accept responsibility for his actions in this case.

Appellant's App. pp. 141-42.

Kling concedes that the trial court properly considered his position of trust with the children. While he also acknowledges that the criminal conduct occurred over a period of years, Kling takes issue with the trial court's observation that he had "ample opportunity to…seek professional help[.]" Br. of Appellant at 8. He argues that the "court has no idea if Mr. Kling could afford treatment, had insurance available with which to pay for treatment, or even had a family physician to discuss the matter with." Id.

The trial court's observation that Kling had "ample opportunity" in nine years to seek professional help is not a separate aggravator. Rather, it reflects "the efforts of a judge to describe in a concise manner what the underlying facts mean, and why they demonstrate that a particular defendant deserves an enhanced sentence[.]" Trusley v.

State, 829 N.E.2d 923, 926 (Ind. 2005). The trial court's comment is an entirely "appropriate legal observation about [a] properly established fact[.]" Id. at 927.

Kling also challenges the trial court's finding that he is unwilling to accept responsibility in this case, arguing that his "inability to intellectually and emotionally understand pedophilia is not tantamount to not taking responsibility." Br. of Appellant at 9. In support of this contention, Kling points to the report of his psychosexual evaluation, which noted Kling's "strong stance of cognitive denial[,]" and that while he admitted most of the alleged facts, "[c]ognitively, he does not recognize the depth and intensity of his pedophilic attachment." Appellant's App. p. 96.

In the pre-sentence investigation report, Kling stated, "I can't tell you today why I did it. It was just one of those things. All I know is that I'm glad I didn't penetrate them. That's the main thing." Appellant's App. p. 79. During his psychosexual evaluation he said, "it started out with horseplay and got out of hand…before I realized what was going on it was too late[.]" Appellant's App. p. 96. In light of these statements, the trial court could reasonably conclude that Kling was unwilling to accept full responsibility for his actions. Thus, we find no error in the trial court's consideration of aggravating circumstances.

B. *Mitigating Circumstances*

The trial court also found the following mitigating circumstances:

> 1. The Defendant is 78 years old.
> 2. The Defendant has suffered no prior criminal convictions. The Court discounts that mitigator in light of the fact that the Defendant molested four of his grandchildren on multiple occasions over a nine (9) year period, and, given the ages of these children, each of those offenses constituted a Class A Felony.

> 3. The Defendant has the support of his community. The Court declines to assign substantial weight to that mitigator in light of the fact that the Defendant's supporters were misled by the Defendant as to the nature of his actions.
> 4. The Defendant's incarceration will pose a hardship on his family.
> 5. The Defendant may be remorseful for this offense. The Court questions the sincerity of the Defendant's remorse in light of the fact that when questioned as to whether he had a problem, the Defendant stated, "No, it's something that came out of the blue."
> 6. The Defendant [w]as employed for 30 years by the same employer.
> 7. The Defendant is a veteran and was honorably discharged from military service.
> 8. The Defendant has a long-standing marriage to the grandmother of the victims in this case.

Appellant's App. p. 141.

First, Kling argues that the trial court improperly discounted the mitigating weight of his lack of criminal history. A trial court is not obligated to assign the same weight to a mitigating circumstance as does the defendant. Patterson v. State, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006), and a trial court may properly conclude that a defendant's lack of a criminal record is not entitled to mitigating weight. Sipple v. State, 788 N.E.2d 473, 483 (Ind. Ct. App. 2003), trans. denied.

Here, Kling admitted to molesting four of his grandchildren over the span of nearly a decade. The trial court's decision to assign minimal aggravating weight to Kling's lack of prior convictions was not an abuse of discretion. See Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998) (trial court considered defendant's lack of prior criminal history, but properly declined to accord it significant weight).

Next, Kling complains the trial court improperly discounted the mitigating weight of his support from the community. At the sentencing hearing, the court noted

> that the defendant has many supporters in the community. Those supporters have expressed themselves to the Court in the form of letters, but like the State, I was struck by the fact that the correspondents who sent those letters to the Court obviously had not been fully apprized of the facts of this case. One theme that was constant throughout these letters is that this was all a big misunderstanding and a lack of communication, and the defendant could not have possibly committed these criminal acts…I must discount these letters and the significance which I attach to these letters, because the correspondents were obviously misled as to the nature of this case by the defendant.

Sent. Tr. pp. 11-12.

Kling seems to argue that the trial court improperly found that he deliberately misled community members.[2] But, no matter how the misinformation occurred, the trial court acted within its discretion when it discounted the mitigating significance it attached to the letters of support.

Kling also contends that the trial court improperly discounted the mitigating weight of his remorse. The court found Kling's remorse to be a mitigating factor, but noted:

> The defendant may or may not be remorseful. It's difficult for me to ascertain. He professes at one time, or at—in one moment to be remorseful, and then when asked if he has a problem, he says no, its something that came out of the blue, as if its some horrible eventuality that was visited upon these children and upon him with no responsibility whatsoever on his part. That leaves the Court to question the sincerity of the defendant's remorse.

Sent. Tr. p. 12.

A trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-35 (Ind. 2002). Without evidence

[2] Kling also argues that this finding violates the rule of Blakely v. Washington, 542 U.S. 296 (2004). However, Blakely concerns facts relied on by a trial court to enhance a sentence above the statutory presumptive, and it is not implicated in a trial court's consideration of mitigating circumstances.

of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. Moreover, the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind.1998).

Finally, Kling asserts that the trial court erred when it failed to find his guilty plea to be a mitigating factor. "'[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return.'" Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004) (quoting Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995)). However, "the significance of this mitigating factor will vary from case to case." Id. at 238, 238 n.3. A guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, the trial court erred when it did not identify Kling's guilty plea as a mitigating factor at all. See Cotto, 829 N.E.2d at 526. Nevertheless, Kling's guilty plea is not entitled to significant mitigating weight. In exchange for his plea, Kling avoided the possibility of conviction on three Class A felonies, carrying a potential aggregate sentence of 150 years. Therefore, Kling received a substantial benefit from his guilty plea, and any error in the trial court's failure to identify it as a separate mitigating circumstance is harmless.

II. Inappropriate Sentence

Appellate courts "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B) (2005). The "nature of the offense" portion of the standard speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs. See Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied. That is, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crime committed. Id. The character of the offender portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances.[3] Id.

On the dates of Kling's crimes, Indiana Code section 35-50-2-5 provided that the presumptive sentence for a Class B felony conviction was ten years, with no more than ten years added for aggravating circumstances and four years subtracted for mitigating circumstances.[4] Kling received twenty years for each Class B felony conviction to be served consecutively resulting in a forty-year maximum sentence.

We must note that the two Class B felony counts to which Kling pled guilty are less than the acts he committed against his grandchildren would have supported. The

[3] Prior to 2001, appellate courts reviewed sentences under the manifestly unreasonable standard. When our supreme court "made the change to the language of the rule . . . [the court] changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." See Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

[4] On April 25, 2005, Indiana Code section 35-50-2-5 was amended and now reads, "a person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)."

trial court's detailed sentencing statement reflects three significant aggravators, namely Kling's position of trust with the children, the period of time in which he continued to molest the children, and his failure to accept complete responsibility for his actions. While the trial court also found several mitigating circumstances, as set forth above, their weight is significantly less substantial.

While Kling argues that his maximum sentences are inappropriate because his case does not present the "worst offense" or "worst offender," in our review of a sentence, we "concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

After due consideration of the trial court's findings of aggravating and mitigating circumstances, the nature of the offense, and the character of the offender, we conclude that under the facts and circumstances presented here, the maximum sentence for each conviction is not inappropriate, as well as the trial court's decision to run the sentences consecutively. See Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003) ("enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person"). Therefore, we affirm the trial court's imposition of maximum, consecutive sentences.

Affirmed.

NAJAM, J., and MAY, J., concur.